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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 86

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY, *Respondent*

BRIEF FOR RESPONDENT

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No. 86

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY, *Respondent*

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Claims [R. 78] is reported at 347 F.2d 509. The findings of the Court of Claims [R. 123] are unreported. The opinion [R. 1] and findings of the Commissioner of the Court of Claims are unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on June 11, 1965 [R. 123]. A timely motion for reconsideration was denied on October 15, 1965 [R. 237]. By orders of the Chief Justice and Mr. Justice Brennan, entered on January 12, 1966, and February 9, 1966, the time for filing a petition for a writ of certiorari was extended to and including March 14, 1966 [R. 238-239]. The petition for a writ of certiorari was filed on that date and certiorari was granted on April 25, 1966 [R. 240, 384 U.S. 917]. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the discovery of violations of the Anti-Kickback Act between subcontractors and employees of a prime government contractor is, under the facts of this case and under applicable law, a valid ground for a forfeiture of the prime contract.

2. Whether, under the facts of this case and applicable legal precedent, the contractor is entitled to restitution for the reasonable expenses it incurred in performing the contract which was breached by the Government.

STATUTE INVOLVED

Section 1 of the Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U.S.C. 51, provides in relevant part:

> "The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, * * * (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract

entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; * * * is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor * * *. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor * * * in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor."

Section 4 of the Act provides:

"Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more that $10,000 or be imprisoned for not more than two years, or both."

STATEMENT

1. THE FACTS

A. The Contract and Its Cancellation

Until 1952, the business of respondent, Acme Process Equipment Company, consisted principally of the manufacture of equipment for the distillery, brewery, and sugar industries. In 1952, it became interested in obtaining government contracts in order to offset unevenness in its commercial business. At such time, respondent had no one on its payroll with background and experience in the field of government procurement [F. 2, R. 124].

On October 23, 1952, Acme submitted a bid to the Army Ordnance Corps for a contract for the manufacture of 75-mm. recoilless rifles. Acme's bid price was $337.31 per rifle (later corrected to $337.23). The four other bids submitted by competitive bidders were at unit prices of $484.05, $930.16, $423.00 and $684.00, respectively [F. 7, R. 126]. Acme was therefore the low bidder and on January 27, 1953, it was awarded a contract for 2,322[1] 75-mm. recoilless rifles at a unit price of $337.23 per rifle, subject to an upward price revision with a ceiling price of $369.20 per rifle [F. 7, 13, 51, 52, R. 126, 132, 205, 206]. In addition to the fact that Acme was low bidder, the Government was interested in developing an additional source of supply [F. 10, R. 108, 130-131]. The Army was at first concerned over Acme's ability to perform the contract but after investigating Acme's plant and personnel, the Government concluded that Acme and its subcontractors would be capable of carrying out the agreement [R. 108].

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[1] This was later increased to 2,751.

The project was largely subcontracted, "leaving for Acme only the final finishing and assembly of components, and the earlier job of fashioning the rifle barrels from rough forgings with machines furnished by the Government under a separate facilities contract" [R. 79]. The largest subcontract was issued to All Metals Industries, Inc. for the production of the chambers and vent assemblies at unit prices of $71.29 (target) and $81.64 (ceiling) for the chambers, and $51.66 (target) and $58.93 (ceiling) for the vent assemblies [F. 19, R. 140].

The contract proved unprofitable for Acme not only because of Acme's inexperience [F. 41, R. 187-188], but also because of delivery failures of subcontractors [F. 42, R. 188-199] and because of defective machinery furnished by the Government under the facilities contract [F. 34-40, 43, R. 153-187, 193]. Its cost of production on initial deliveries through December 31, 1953, was $1,179.29 per rifle [F. 52(a), R. 206]. However, by June 30, 1954, the cost per rifle had been reduced to $690.21 [F. 52(c), R. 207-208]. Although extensions in delivery schedules excused some delays in deliveries, Acme fell behind in others and liquidated damages were assessed [F. 14, 46, R. 133, 199-200]. By the end of July 1954, 1,163 rifles had been delivered [F. 14, R. 133] at an average cost of $877.77 per rifle.[2]

After the discovery of "alleged violations of statutes relating to kickbacks, contingent fees, and conflicts of interests" [R. 79], the Army, on July 22, 1954, suspended work under the contract and on August 18, 1954, after Acme had delivered 1,163 rifles, the Army

[2] This figure is based on the average costs of $1,179.29 for the first 446 and $690.21 for the remaining 717 rifles actually delivered [R. 110].

Ordnance Corps notified Acme that its contract was cancelled for unspecified "statutory violations" [F. 47, 49, R. 201, 202-203]. The circumstances surrounding the cancellation of Acme's contract are fully set forth in the findings of fact of the Court of Claims [F. 47-50, 54-55, R. 201-205, 212-223].

B. The Kickbacks

In October 1952, Acme hired Harry K. Tucker, Jr. and James Norris to manage a separate division to be set up by Acme to handle government contracts in the metals field. Norris was made general manager of production with authority to submit bids, sign government contracts, and award subcontracts; Tucker was put in charge of sales, government contracts, and expediting and coordinating subcontracts [F. 3, 16, R. 124, 138].

Prior to the award of the prime contract and unbeknown to Acme, Tucker had entered into a contract with All Metals Industries, Inc., under which he was to receive a commission on sales procured by him for that company. After the award of the prime contract to Acme, Tucker secured for All Metals a subcontract from Acme to manufacture chambers and vent assemblies for the 75-mm. recoilless rifles [F. 18, 19, R. 139-141].

Subsequent to the award of All Metals' subcontract, Tucker and Jack Epstein (then superintendent of Acme's plant in Oreland, Pennsylvania, and son of its president Joshua Epstein) threatened to cancel All Metals' subcontract unless the subcontractor paid $25,000 to Jack Epstein. As an alternative, an arrangement was made whereby All Metals agreed to pay

$23,500 to a dummy corporation owned by Tucker, Norris, and Jack Epstein, for consulting engineering services. To cover the amount extorted from All Metals, the subcontractor increased its unit price to Acme for vent assemblies by $10.00. A total of $12,000 was paid by All Metals to Gunn Engineering Company, the dummy corporation referred to above, for services which were never rendered [F. 20, R. 141-142]. Acme had no information until the late summer and fall of 1953 which would lead it to suspect that Tucker, Norris and Jack Epstein had made illegal arrangements or that it was being victimized by them, and it was not until around the time of the cancellation of Acme's contract in August 1954 that it obtained specific knowledge of the illegal arrangments [F. 20, 30, R. 141-142, 149].

In addition to the secret arrangements which Tucker had with All Metals, similar arrangements were made by Tucker with two other companies, both of which were subsequently awarded subcontracts by Acme. None of the officials of Acme (with the exception of Tucker, Norris and Jack Epstein) were aware of these arrangements until after the cancellation of Acme's prime contract [F. 22, 23, R. 144-146]. A fourth company was awarded subcontracts by Acme after having hired Tucker's father partially on a commission basis, and another company received a subcontract from Acme after having entered into a clandestine agreement to pay commissions to Philip Chagnon on business obtained by him. Chagnon had been previously hired by Norris as his assistant in Acme's plant. None of Acme's responsible officials were aware of the secret arrangement involving Tucker's father or Chagnon [F. 24, 25, R. 146-147].

Norris was discharged by Acme in September 1953, after it was discovered that he had charged expenses incurred in connection with work on his farm against Acme's prime contract [F. 26, R. 147]. By the end of November 1953, the employment of both Tucker and Chagnon had been terminated [F. 27, 28, R. 148]. On August 28, 1954, Jack Epstein resigned from Acme [F. 29, R. 148].

Tucker, Norris and Jack Epstein were subsequently indicted for violation of the Anti-Kickback Act, 60 Stat. 37 [F. 31, R. 149]. After presentation of the Government's case, the defendants' motion for acquittal was granted on the ground that the Act at that time did not apply to a fixed price contract with a provision for price redetermination subject to a ceiling price [F. 31, 54(j), R. 149-150, 219-220].[3] The District Court remarked that

> "It may well be that Congress thought that in this type of contract, the employer would be the one that would protect the interests of the United States, but no employer can protect himself against treacherous employees who are determined to commit morally reprehensible acts and who for the sake of a few paltry dollars, set up the type of vicious scheme that has been set up in this case, which resulted in increased cost both to the employer and to the United States." [F. 31, R. 150].

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[3] The District Court's decision is not contrary to the decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Barnard*, 255 F.2d 583 (C.A. 10, 1958), *certiorari* denied, 358 U.S. 919 (1958), for the reason that in *Barnard* the contract had "no limitation * * * upon the range of redetermination or revision of prices, upward or downward."

The District Court further said that "This case clearly showed that the employer was victimized, and I would say indirectly the United States was also, but the defendants were narrowly within the law." [F. 31, R. 150]. As a result of the District Court's decision, amendatory legislation was recommended (H. Rep. No. 1880, S. Rep. No. 1585, 86th Cong., 2d Sess., 1960) and the Act was amended in 1960 to apply to all negotiated contracts (74 Stat. 740, 41 U.S.C. 51).

2. PROCEEDINGS BELOW

On July 26, 1957, after nearly three years of fruitless but almost successful efforts by Acme to obtain an administrative settlement, Acme filed this action in the Court of Claims in which it sought restitution of its unreimbursed costs of performance or, as an alternative, damages for breach of contract [F. 54, 55, R. 212-223]. Settlement was blocked only by the intransigence of the Army Ordnance Corps which "through its General Counsel was unswerving in its views that cancellation of the contract was legally justified, despite some discouraging responses from other agencies of the Government which had reviewed the matter." [F. 54(k), R. 220].

The Government's major defense to Acme's suit in the Court of Claims was that Acme was entitled to no recovery because it violated certain statutes and covenants (concerning contingent fees, kickbacks, false claims, and conflicts of interests). After a full trial before a commissioner, the Court of Claims, in a lengthy opinion issued June 11, 1965, unanimously rejected all of the Government's defenses and found that the cancellation of Acme's prime contract was unjustified and the Government had breached the contract when it cancelled [R. 78-123].

Insofar as the Government's contention that it was entitled to cancel the contract for violations of the Anti-Kickback Act was concerned, the Court of Claims first expressed the opinion that "it is highly doubtful that there was any pre-existing right of the Government to cancel the entire contract of a prime contractor, whose agents received improper kickbacks of which he was unaware." The court then went on to state that since Congress, in enacting the 1946 Act, gave the Government only one civil remedy—recovery of the kickbacks—the Government had no right to annul the contract [R. 91-92].

The court below also expressed grave doubts as to whether the 1946 Act was applicable to the contract in question. Citing *Muschany* v. *United States,* 324 U.S. 49, 66-67 (1945), the court said that if the 1946 Act was inapplicable, the improper actions could hardly have contravened any recognized federal public policy. Of particular importance, the court said that

> "When Acme's agents received kickbacks about which plaintiff had no knowledge, it can scarcely be said that plaintiff (as distinguished from the agents) violated 'obvious ethical or moral standards,' and that its contract with the defendant could therefore be cancelled on that ground." [R. 92-93].

The decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Barnard,* 225 F.2d 583 (C.A. 10, 1958), *certiorari* denied, 358 U.S. 919 (1958), was said by the court below to be distinguishable because the contract in *Barnard* had "no limitation * * * upon the range of redetermination or revision of prices, upward or downward" as opposed to Acme's contract which contained a ceiling price [R. 93].

The Government's contention that the case was governed by the *Dixon-Yates* case [*United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961)], was rejected by the Court of Claims. The court first pointed out that the statutory provision violated in *Dixon-Yates* was clearly on the books at the time of the misconduct while the court found it "highly questionable" whether the 1946 Anti-Kickback Act applied to Acme's contract. The Court of Claims then went on to say that the cases were different because the statute in *Dixon-Yates* provided for no more than a criminal sanction, whereas Congress in the Anti-Kickback Act specifically provided for a civil remedy. Most significantly, the Court of Claims said that the violation in *Dixon-Yates* affected the validity of the entire transaction since it related to the negotiation and award of the contract to a not-altogether-innocent contractor. On the other hand, in the instant case, the kickbacks were not related to the negotiation and execution of Acme's contract with the Government but were separate transactions involving the subcontractors and were made after the award of the contract to Acme by the Government without Acme's knowledge, actual or implied [R. 93-94]. The court below also noted that the wrongdoings of Tucker and his co-conspirators could not be imputed to Acme since Acme "was being swindled by its own agents" [R. 88, fn. 12].

With reference to the appropriate measure of damages to be awarded Acme for the Government's breach of contract, the Court of Claims held that Acme was entitled to restitutionary relief for the Government's breach of its express contract. In so holding, the court acknowledged the fact that restitution has long

been recognized as merely an alternative remedy for a breach of contract by the commentators and by both the federal and state courts. Since contracts with the Government have been held to be governed by the same principles as "those between man and man" the court below said that it was, consequently, obliged to award restitution to Acme unless this form of recovery was precluded by the Tucker Act, 28 U.S.C. 1491. Acme's claim for restitution was held by the court below to be within the ambit of the Tucker Act because such claim was founded upon an express contract within the meaning of that Act [R. 105-109].

Having established Acme's entitlement to restitution, the court went on to hold that recovery was not limited to the value of the goods actually received by the Government but could be based on the reasonable value of Acme's entire performance. The reasonable value of Acme's performance, said the Court of Claims, is most accurately reflected by the actual costs it incurred in performing its contract unless the Government can establish that such costs were excessive [R. 109-111].

The court also held that Acme's recovery must be reduced by any kickbacks it latently paid through payments to its subcontractors so that the Government will receive the full statutory relief available to it under the Anti-Kickback Act [R. 110-111].

SUMMARY OF ARGUMENT

The government has challenged the rulings of the Court of Claims that (1) the Government was not entitled to cancel the contract for violation of the Anti-Kickback Act by certain of Acme's employees and hence was guilty of a breach of contract, and (2) that

Acme was entitled by way of remedy therefor to restitution of the reasonable costs it had expended in performing the contract. It is the respondent's position that the decision of the Court of Claims on both of these two aspects of this case is correct and is fully supported by the facts of this case and applicable legal precedent.

I.

Acme's contract with the Government was not made in violation of any statutory prohibition nor did it result from an illegal transaction. Consequently, the test of the *Dixon-Yates* case has not been met and the Government's reliance upon that case is misplaced.

The primary purpose of the original Anti-Kickback Act was to insure that the Government would have a right to recover the amount of any illegal kickback payments. Otherwise, the Government would ultimately bear the cost of the kickbacks. To further discourage kickbacks in government contracts, a criminal penalty for violation of the Act was added by Congress. The Government had no pre-existing right at the time of the enactment of the Act to cancel a prime contract because of kickback payments by subcontractors and Congress created no such remedy in enacting the Anti-Kickback Act, but, on the contrary, Congress, by providing for a specific civil remedy, precluded any such remedy as contract annulment.

The remedies provided for in the Anti-Kickback Act are adequate to relieve the Government of the cost of any illegal kickbacks and thus insure that the policy enunciated in the Act will be carried out.

II.

The award of restitutionary relief by the Court of Claims is in accordance with well-established principles of contract law and is appropriate under the facts of this case. Restitution is not limited to cases where conventional damages are inadequate; nor is it limited to cases involving breaches of profitable contracts, but it is applicable to cases involving losing contracts as well. Restitution, as an alternative remedy for breach of contract, is available where, as in the present case, there is a total breach of contract.

The measure of relief decreed by the Court of Claims is not punitive, but is compensatory. Such a measure of relief merely compensates Acme for the reasonable costs it incurred in reliance upon the Government's implied promise that it would do nothing to prevent performance of the entire contract by Acme. The Government, as the contract-breaker, should not be allowed to say that Acme was not damaged to the extent of the reasonable costs Acme expended in performing the contract.

Neither the fact that the contract could have been terminated for the convenience of the Government nor the fact that it is the policy of the Government to award procurement contracts only on a fixed price basis, has any bearing upon the question of the measure of recovery when the Government breaches a contract. Restitution is permissible in suits under the Tucker Act and it does not contravene any federal procurement policies.

ARGUMENT

I.

WHERE EMPLOYEES OF A PRIME GOVERNMENT CONTRACTOR RECEIVE KICKBACKS FROM A SUBCONTRACTOR, WITHOUT THE KNOWLEDGE OF THE PRIME CONTRACTOR, IN VIOLATION OF THE ANTI-KICKBACK ACT, THE GOVERNMENT HAS NO RIGHT TO CANCEL.

A. The Right to Cancel a Contract Because of a Statutory Violation Can Be Implied Only Where the Contract Was Made or Procured in Violation of the Statutory Prohibition.

The legislative history of the Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U.S.C. 51, clearly indicates that the purpose of that Act was to insure that the Government would have the right to recover the amount of any kickbacks which might be discovered. H.Rep. No. 212, 79th Cong., 1st Sess., pp. 4-6 (1945); H.Rep. No. 1880, 86th Cong., 2d Sess. (1960). The House Report on the 1946 Act states: "There is no existing statutory or other authority of law under which it may be said that the United States clearly has a right to recover the amounts of any such fees or gratuities." H.Rep. No. 212, 79th Cong., 1st Sess. p. 2 (1945).[4] It is extremely doubtful that the Government had or has any right at common law to sue to recover the amount of the kickbacks. More importantly, no authority was presented to the Court of Claims, nor has any been presented to this Court, which indicates, or even hints, that the Government had or

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[4] It is also interesting to note that when the Comptroller General sent his recommendation to the Congress that the Anti-Kickback Act be amended to apply to all types of negotiated contracts, he noted that before the Act was enacted in 1946, "there was no specific statutory remedy for recovery by the Government of the amount of the kickback, and there was serious doubt as to the adequacy of common law remedies." H. Rep. No. 1880, 86th Cong., 2d Sess. (1960).

has a common law right to cancel the entire contract of a prime contractor, whose employees have received improper kickbacks of which the prime contractor was not aware, and by which such "treacherous employees" the prime contractor was thereby "victimized." Acme may have had a right at common law to cancel its agreements with the subcontractors after discovering the secret kickback arrangements but this does not mean that the Government, which had no privity of contract with the subcontractors, had any such right to cancel its prime contract with Acme. See Restatement, AGENCY 2d, § 391, Comment "g". Nevertheless, the Government contends that such a right may be implied from the Anti-Kickback Act—a sort of "bootstrap" argument which reads into a statute language, which does not exist, by applying a common law principle, which also does not exist.

The right to cancel a contract because of a statutory violation can be properly implied only where the contract is made or procured in violation of the statutory prohibition. This principle was clearly recognized by this Court in *United States* v. *Mississippi Valley Generating Co., supra* (the *Dixon-Yates* case), upon which the Government heavily relies. The contract in that case "resulted from an illegal transaction," i.e., negotiations in which the Government's representative had at the same time been an officer of a company which expected to benefit from the contract. 364 U.S. at 546. The Court said that such a contract is not to be enforced "when it arises out of" circumstances that would lead enforcement to offend the essential purpose of the statute. 364 U.S. at 563. The purpose of nonenforcement was said to be the protection of the public from the corruption which might be undetectable be-

neath the surface of "a contract conceived in a tainted transaction." 364 U.S. at 565. The inherent difficulty in detecting corruption was said to require that "contracts made in violation of Section 434" be held unenforceable. 364 U.S. at 565.

It is not enough under the test of *Dixon-Yates* that there be a violation of a statute. The contract itself must be made or conceived in violation of the statute. Where the formation of the contract does not result from an illegal transaction or statutory violation the Government has no right to cancel. 364 U.S. at 564. See also *United States* v. *Chemical Foundation,* 272 U.S. 1 (1926); *Muschany* v. *United States,* 324 U.S. 49 (1944). That the contract must emanate from an illegal transaction in order to be rendered unenforceable was clearly pointed out by this Court in distinguishing the *Muschany* case, upon which the Court of Claims relied in *Dixon-Yates*, and also in the instant case:

> "* * * unlike this case, *Muschany* did not involve a contract which resulted from an illegal transaction, and it is consequently understandable that the contract there in question was enforced." 364 U.S. at 564.

As in the *Dixon-Yates* case, other decisions of this Court have recognized that the right of cancellation is appropriate only where the contract resulted from an illegal transaction. For instance, *Mammoth Oil Co.* v. *United States,* 275 U.S. 13 (1927), involved an oil lease "fraudulently made to circumvent the law and to defeat public policy." 275 U.S. at 55. Likewise, the contracts and leases in *Pan-American Petroleum Co.* v. *United States,* 273 U.S. 456 (1926), were

"consummated by conspiracy, corruption and fraud." 273 U.S. at 509. *Crocker* v. *United States,* 240 U.S. 74 (1915), involved a contract which resulted from an illegal arrangement with a government employee. *Burck* v. *Taylor,* 152 U.S. 634 (1894), involved a contract "made in contravention of a statute." *Miller* v. *Ammon,* 145 U.S. 421 (1892), discusses the general rule of law that "a contract made in violation of a statute is void."

The Government has thus misconceived the test of the *Dixon-Yates* case. It leaves out an essential element: the contract must have been made in violation of a statute. Hence, the test is more properly stated as follows: the Government may, without fault, cancel a procurement contract *made in violation of a statute* if such a step is necessary to effectuate the policies of the statute that has been violated. Respondent submits that this test has not been met in the present case.

B. The Test of the Dixon-Yates Case Has Not Been Met Here Since Acme's Prime Contract Was Not Made in Violation of the Anti-Kickback Act; in Any Event, the Anti-Kickback Act Gave the Government No Right to Cancel.

1. The Court of Claims found in Acme's case that "the kickbacks * * * were in no way related to the negotiation and execution of Contract 1213, and do not affect its validity. They were separate transactions made without the knowledge of plaintiff which certainly had nothing to gain by these secret dealings." [R. 94]. On the contrary, in *Dixon-Yates* the contract was made in violation of the statutory prohibition." 364 U.S. at 563, 564. In addition, the plaintiff in *Dixon-Yates* was fully aware that the Government was represented by a consultant who was, at the same time, associated with an investment banking company which

stood to profit if plaintiff was awarded the contract. Thus, the principle of *Dixon-Yates* does not require or direct that Acme's prime contract be cancelled.[5]

The Anti-Kickback Act prohibits the "payment" of fees or commissions to agents of a prime contractor as an inducement for the award of a subcontract. 41 U.S.C. 51. There could be no violation of the statute until after the award of Acme's prime contract for if any such prohibited payments were made they were not made until after the award. All Metals' subcontract conceivably may have been made in contravention of the statute but it cannot be said that Acme's prime contract, made without knowledge of the secret arrangements of its subcontractors, was made in violation of the statute for, if the statute was violated, it was not so violated until after the award of Acme's contract.

Respondent agrees with the Government that the public should be protected against the sort of kickback arrangements which existed in this case. However,

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[5] Respondent believes *Dixon-Yates* is also clearly distinguishable from the present case for other reasons. *Dixon-Yates* did not involve a situation like that of Acme where a prime contractor's employees were also agents of a subcontractor. Instead, *Dixon-Yates* involved a situation where a Government employee was also an agent of a company which stood to benefit from the award of the prime contract. Congress provided no civil remedy for a violation of the statute involved in *Dixon-Yates*, whereas it provided a specific civil remedy for a violation of the statute involved in the present case. It is also significant that in *Dixon-Yates* the wrongdoings of the contractor's employees were imputable to the contractor. See *Carrier Corp.* v. *United States*, 328 F.2d 328 (Ct. Cl., 1964). On the other hand, since Acme was "swindled by its own agents" and had nothing to gain from their actions, it cannot be charged with the violations of the Act committed by its employees. 3 Fletcher, PRIVATE CORPORATIONS, § 826 (rev. ed. 1947); *Maryland Casualty Co.* v. *Tulsa Industrial Loan & Investment Co.*, 83 F.2d 14 (C.A. 10, 1936).

issue is taken with the Government's contention that contract cancellation is either necessary or permissible here.

2. Not every contract in contravention of the terms of a statute is unenforceable. The courts must search the language of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not. *Burck* v. *Taylor, supra.*

The primary purpose of the Anti-Kickback Act was to provide a secure legal basis for recovering kickback payments discovered on audit so that the Government would not ultimately bear the costs of the kickbacks. H.Rep. No. 212, 79th Cong., 1st Sess., pp. 4-6 (1945); H.Rep. No. 1880, 86th Cong., 2d Sess. (1960). The Anti-Kickback Act provides a specific civil remedy for its violation, i.e., recovery of the kickbacks. Respondent submits that the civil remedy provided for by the Act, together with the criminal penalty imposed by the Act, are adequate to effectuate the basic purpose of the Act[6] and it was never the intention of Congress to create by implication the remedy of contract cancellation. On the contrary, by giving the Government only one civil remedy against contractors whose agents or employees had received secret kickbacks unknown to the contractor, Congress thereby precluded the addi-

[6] In a letter to the Speaker of the House of Representatives, which accompanies the committee reports on the 1960 amendment to the Act, the Comptroller General said: "We are satisfied that enactment of the Anti-Kickback Act of 1946 has had a salutary and strong deterrent effect against commercial bribery and the payment of kickbacks under the cost reimburseable type contracts which the statute was designed to cover." H. Rep. No. 1880, 86th Cong., 2d Sess. (1960). The Government's contention that contract cancellation is necessary to carry out the policies of the Act is therefore contradictory.

tional remedy of contract annulment. The Court of Claims in so holding applied a well-established rule of statutory construction—*inclusio unius est exclusio alterius.*

It is not the function of the judiciary to create civil remedies which Congress did not have in mind at the time of an enactment. *Unexcelled Chemical Corporation* v. *United States,* 149 F.Supp. 383 (Ct. Cl., 1957). The Court of Claims properly ruled that although the duplicity of Acme's employees may have given Acme a right to cancel its subcontracts, Congress did not intend to give the Government a right to cancel the prime contract under such circumstances.

While the kickbacks could have resulted in increased costs to the Government as well as to Acme unless some action were taken, the Court of Claims' decision requires Acme's recovery to be reduced by the amount of any kickbacks latently included in payments to its subcontractors. Therefore, the kickbacks will not cost the Government a single cent. The policy expressed by Congress in the Anti-Kickback Act will therefore be fully abided by.

3. The Court of Claims, in addition to the other reasons given for holding that the Anti-Kickback Act gave the Government no right to cancel Acme's contract, expressed great doubt as to the applicability of the Anti-Kickback Act, as enacted in 1946, to Acme's contract. The Court distinguished *United States* v. *Barnard, supra,* for the reason that the contract involved in *Barnard* was a price redetermination contract with no ceiling price whereas the price redetermination feature of Acme's contract was subject to a ceiling price. The *Barnard* case did not resolve the

question as to whether the 1946 Act applied to the type of contract involved in the instant case. This fact is clearly evident from the legislative history of the 1960 amendment. H.Rep. No. 1880, 86th Cong., 2d Sess. (1960). Although the 1960 amendment clearly covers the type of contract involved in the present case and is retroactive, respondent believes that to apply the 1960 amendment retroactively to work a forfeiture of Acme's contract (which was the very contract which precipitated the 1960 amendment) would be manifestly unfair and inequitable and would violate the prohibition contained in the Constitution against the enactment of *ex post facto* laws.

Although the retrospective application of Section 1 of the 1960 Anti-Kickback Act to enable the Government to sue to recover the kickbacks does not offend the Constitution [*United States* v. *Davio,* 136 F.Supp. 423 (1955)], Section 4 of the Act, which imposes criminal penalties, could not have been applied retroactively to punish the individuals receiving the kickbacks. *Fletcher* v. *Peck,* 6 Cranch 87 (1810); *Calder* v. *Bull,* 3 Dall. 386 (1798). Nevertheless, the Government urges this Court to retroactively apply the statute to work a total forfeiture of Acme's contract because of kickback violations which were not punishable as crimes when committed. Respondent submits that such a result would be repugnant to the basic concepts of the Constitutional prohibition against *ex post facto* laws. U. S. Const., § 9, Cl. 3; *Burgess* v. *Salmon,* 97 U.S. 381 (1878); *Fletcher* v. *Peck, supra.*

For all of the reasons set forth above, respondent believes that the Court of Claims was correct in holding that the cancellation of Acme's contract was unjustified and was therefore a breach of contract by the Government.

II.

THE MEASURE OF DAMAGES ADOPTED BY THE COURT OF CLAIMS IS IN ACCORDANCE WITH WELL-ESTABLISHED PRINCIPLES OF CONTRACT LAW AND IS APPROPRIATE UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Restitution has long been recognized by legal scholars and by the federal and state courts of this country as an alternative remedy for breach of contract.[7]

The other two recognized remedies for breach of contract are specific performance and damages. However, since the Court of Claims may only award monetary judgments under the Tucker Act, 28 U.S.C. 1491, no question of specific performance is involved in this case and we thus are concerned with only the remedies of damages and restitution.

The remedy of damages is designed to put a party in the position he would be if the contract had been fully performed, i.e., his post-contract position, whereas restitution is designed to restore the innocent party to his *status quo ante,* i.e., his pre-contract position. Restatement, CONTRACTS, §§ 326, 347 (1932).

Respondent believes that the Court of Claims' allowance of restitutional relief in this case was not only consistent with well-established principles of contract law but that it was appropriate under the cir-

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[7] Restatement, CONTRACTS, §§ 347-357; 5 Corbin, CONTRACTS, §§ 1102-21 (1951); Williston, CONTRACTS, §§ 1454-85 (rev. ed. 1937). See also, *Schwasnick* v. *Blandin,* 65 F.2d 354, 357 (C.A. 2, 1937); *Michael Del Balso, Inc.* v. *Carozza,* 136 F.2d 280 (C.A. D.C., 1943); *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.,* 146 F.2d 606, 610 (C.A. 2, 1944); *Southern Painting Co.* v. *United States ex rel. Silver,* 222 F.2d 431 (C.A. 10, 1955); *Valente* v. *Weinberg,* 80 Conn. 134, 67 Atl. 369 (1907); *Pelletier* v. *Masse,* 49 R. I. 408, 143 Atl. 609 (1928).

cumstances of this case. Respondent also believes that the Court of Claims' decision does not contravene any federal procurement policies.

A. Restitution Is Not Limited to Cases Where Damages Are Inadequate to Compensate the Plaintiff for the Loss He Has Suffered as a Result of the Breach.

The Government does not now contend, as it did in the court below, that restitution is never available as a contract remedy in suits under the Tucker Act, 28 U.S.C. 1491. Now the Government contends that restitution is not available where the "traditional" remedy of damages is adequate to compensate a party for the loss resulting from the termination of his contract and where restitution would place such party in a better position than he would have attained had the contract been completed.

Respondent submits, however, that the Government's contention is completely contrary to the well-established rule in this country to the effect that the only limitation on the availability of restitution as an alternative remedy for breach of contract is that there be a material or a total breach of contract. See Corbin, CONTRACTS, § 1104 (1951); Williston, CONTRACTS, § 1455 (rev. ed. 1937).

1. Restitution as a remedy for breach of contract was recognized in England as early as 1831. *Planche* v. *Colburn,* 8 Bing. 14, 131 Eng. Rep. 305 (1831). There the defendant had engaged the plaintiff to write a book for publication in a "juvenile library" series. After the plaintiff had spent time in preparation of the book but before he had completed a manuscript the defendant abandoned the project. Although the defendant never received a manuscript or any part of

one, it was held that the plaintiff could recover the value of his work in an action on the common counts. Restitution was given, in short, for the value of "the performance for which the defendant bargained." Although there are still many exceptions and inconsistencies in the application of the rule in England, the American courts have adopted a more liberal view. See Williston, CONTRACTS, § 1455 (rev. ed. 1937).

A leading case in this country on the concept of restitution is *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, 146 F.2d 606 (C.A. 2, 1944). The court there said that the right of a promisee to "forego any suit on the contract and claim only the reasonable value of his performance" was an accepted principle of contract law "save for an occasional case viewed as illogical by the text writers, who are solidly in support of the doctrine." 146 F.2d at 610.

The *Zara* case involved a construction contract but the opinion in that case nowhere suggests that restitution is limited to that type of case.

Restitution has never been limited to employment and construction contracts as the Government suggests. It has also been applied, for example, to contracts for the sale or purchase of goods as well. See, e.g., *Smith* v. *Keith & Perry Coal Co.*, 36 Mo. App. 567 (1889); *Bush* v. *Canfield*, 2 Conn. 485 (1818).

Judge Learned Hand recognized the availability of restitution as a remedy for a breach of contract in *Schwasnick* v. *Blandin*, 65 F.2d 354 (C.A. 2, 1937), where he said that "if the promisee has performed so far as he has gone, and the promisor breaks his promise, the promisee may abandon the contract and sue

for restitution, in which he can recover the reasonable value of his services, measured by what he could have got for them in the market, and not by their benefit to the promisor. * * * it is the breach," said Judge Hand, "which gives him the power to call off the contract and raises the obligation to restore him to the status quo ante." 65 F.2d at 357.

As authority in the *Schwasnick* case, Judge Hand cites the Restatement, CONTRACTS, § 347(1)(a), comment "c"; Williston, CONTRACTS, § 1480, and the decision of this Court in the often-cited case of *United States* v. *Behan,* 110 U.S. 338 (1884). This Court's opinion in the *Behan* case, a case involving a contract with the Government for certain improvements to the harbor at New Orleans, clearly supports an award of restitutionary relief in the present case. Mr. Justice Bradley, in his opinion in that case, said:

> "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit.* There is then no question of losses or profits." 110 U.S. at 345.

There is a line of cases beginning with *L. Albert & Son* v. *Armstrong Rubber Co.,* 178 F.2d 182 (C.A. 2, 1949), which holds that in a suit for damages for breach of contract the "promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost if the contract had been performed." 178 F.2d at 189. This doctrine does not apply, however, to the situa-

tion where the promisee seeks restitution for the value of his services in actually performing the contract. *Schwasnick* v. *Blandin, supra.* The outlay for which recovery was sought in the *Armstrong Rubber* case, for example, was the cost incurred by a buyer of machinery in constructing a foundation upon which to place machines designed to recondition old rubber. Performance of the contract in that case by the buyer did not consist of the construction of the foundation but performance consisted of the acceptance of the machinery and payment of the purchase price therefor. In Acme's case, however, the manufacture of recoilless rifles was part of the actual performance bargained for by the Government since Acme's contract was not merely for the sale of a finished product but was for the manufacture and delivery of such product. Acme's costs were incurred in actually performing the contract—not in preparation for performance.

2. It is true that in a suit to recover common law damages a party is not entitled to be placed in a better position than he would have been in had the contract been completed. *Blair* v. *United States,* 150 F.2d 676, 678 (1945). But this doctrine has no application where a party seeks restitution. In seeking damages for breach of contract, the plaintiff is asking that he be placed in as good a position as he would have been in had the contract been completed. It is thus perfectly logical that a plaintiff should not be placed in a better position than he would have been in had the contract been completed. However, in granting restitution as a remedy for breach of contract, "the purpose to be attained is the restoration of the injured party to as good a position as that occupied by him

before the contract was made." Restatement, CONTRACTS, § 347, comment "b". Hence, where restitution is sought, the position in which the plaintiff would have been had the contract been completed is immaterial.

The concept of restoring a party to the *status quo ante* upon rescission of a contract by the Government was recognized by the Court of Claims in *New York Mail & Newspaper Transportation Co. v. United States,* 154 F.Supp. 271 (Ct. Cl., 1957), *certiorari* denied, 355 U.S. 904 (1957), where the court said: "When an individual or the Government rescinds a contract, the parties are to be placed as far as possible in the position they would have occupied without the transaction." The same position was taken in *Rumley v. United States,* 285 F.2d 773 (Ct. Cl., 1961), where it was said: "Rescission contemplates a return by the parties to the status quo."

The Government thus misconceives the underlying theory of restitution. Even so, the alternative remedy of damages would fall far short of adequately compensating Acme for its loss in this case.

B. Restitutionary Relief Is Appropriate Under the Facts of This Case.

The Government argues that Acme would have lost large sums of money if it had been allowed to complete the contract and therefore to award restitution would result in a windfall to Acme. As discussed previously, since Acme elected to forego a suit for damages and seek restitution for the value of its performance, whether Acme would have lost money on the contract or not is unimportant. Nevertheless, no one knows exactly what amount Acme would have lost had

it been permitted to complete.[8] In the case of the manufacture of any new product, initial costs normally are high but as production continues a relatively high level of efficiency is reached at which time costs are averaged out. Until such time as a high level of efficiency has been reached, there is no accurate way to estimate completion costs and such costs must therefore, of necessity, be deemed speculative.

In Acme's case, initial costs were high not only due to Acme's inexperience and to the inexperience of its subcontractors, but also due to the fact that the Government furnished it with defective machinery under the facilities contract, which fact was responsible for one-third of the "delay factors in terms of time or cost" incurred by Acme [F. 43, R. 191-193]. This significant fact is conveniently overlooked by the Government on brief.

The speculation in this case on the amount of Acme's loss (a significant part of which was caused by the Government itself, as indicated above) arises solely as a result of the Government's breach of contract. Had there been no breach of contract there would have been no necessity to so speculate. For the same reason

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[8] Although the Commissioner of the Court of Claims found that Acme would have lost $550,409 if it had been allowed to complete the contract [F. 69, R.75], exception was taken to such finding upon the ground that the amount of Acme's prospective loss was not established by the record and the Court of Claims made no finding as to the amount Acme would have lost. If such prospective loss is relevant the burden of proving the amount of such loss was clearly on the government. *L. Albert & Son* v. *Armstrong Rubber Co., supra.* Although the issue of whether the Government proved the amount Acme would have lost if the contract had been completed is not before this Court, respondent believes the amount of such loss has not been established.

that prospective profits may not be recovered where not proved or where they are speculative, prospective losses which might have been incurred had the party not been prevented from completing his contract may not be charged against the costs incurred by the innocent party in performing the contract. *United States* v. *Behan, supra.* To deny restitutional relief in the present case would result in charging Acme with such prospective losses, thus denying to Acme whatever benefit it might have been able to obtain by a reduction of costs through increased efficiency for the balance of its performance.

It is also important to note that the benefit which the Government bargained for in this case was not merely the manufacture and delivery of the recoilless rifles called for under this one contract. One of the benefits contemplated by the Government in awarding the contract to Acme was that "placing this procurement [in] subject contractor's plant will not only broaden the manufacturing base but create a salutary effect, pricewise, on all other procurements of this type." [R. 108]. Likewise, the benefit to Acme was not limited to the price to be received under this one contract. If the Government had not repudiated this contract, Acme would undoubtedly have had an opportunity to recoup any loss it might have incurred on this contract in future contracts as efficiency increased and the heavy initial costs incurred under this contract were averaged out. But the Government repudiated its contract, thereby depriving Acme of any chance whatsoever of ever realizing such benefit.

The Government's argument that Acme's costs were not caused by the Government's breach serves no basis

upon which to deny restitutional relief for the simple reason that "The party who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred." *United States* v. *Behan,* 110 U.S. at 85. Furthermore, the concept of restitution as recognized by the Court of Claims would deny to Acme recovery of any costs which are shown to be excessive as a result, for example, of inefficiency or extravagance [R. 109]. Not only is the Government's argument therefore meritless on this point but it is also premature for the Court of Claims has decreed that the Government shall have an opportunity to show that Acme's costs were excessive.

1. Respondent believes there is no question that it had a right to disregard the terms of the contract upon the Government's breach—"that is, to quit performance on [its] own side and relinquish [its] right to compensatory damages measured by reference to the terms of the contract"—and demand restitution for the value of its performance. Woodward, QUASI-CONTRACTS, § 260 (1913). See also, Keener, QUASI-CONTRACTS, § 299 (1893).[9]

There is no more merit to the Government's argument that the Tucker Act does not permit a contractor

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[9] This view of the nature of the restitutionary remedy was also well expressed by Judge Hand in *Schwasnick* v. *Blandin, supra.* When the promisor has broken his promise, Judge Hand said, and the plaintiff seeks restitution, "he sues upon that wrong. True, he does not seek the equivalent in money of what was promised; but it is the breach which gives him the power to call off the contract and raises the obligation to restore him to the status quo ante." 65 F.2d at 357.

to ignore the contract price and sue for restitution than there would be to the argument that a contractor cannot sue for common law damages for breach of contract under the Tucker Act where the Government has wrongfully terminated the contract. In both situations the contract has been wrongfully terminated so that technically there no longer exists a contract to sue on. In both situations the contractor's cause of action arises out of the same set of facts—the wrongful termination of an express contract. Consequently, in both situations the contractor's claim is "founded" upon an express contract. 28 U.S.C. 1491.

None of the cases cited by the Government to the effect that a suit sounding in quasi-contract or *quantum meruit* is not permissible under the Tucker Act are applicable to the instant case for the simple reason that Acme's cause of action here arose out of and was "founded" upon the breach by the government of an express contract—not upon a contract implied in law. It is true that Acme seeks recovery for the reasonable value of its services; however, its right to claim the reasonable value of its services resulted because the Government improperly terminated plaintiff's express contract. *Cf. Camellia Apartments, Inc.* v. *United States,* 344 F.2d 667 (Ct. Cl., 1964).

Respondent believes that the position of the Government in this case is contrary to the well-established rule in this country that where a plaintiff's failure to complete the contract is due to the defendant's default and the plaintiff elects to forego a suit for damages and sue for restitution, the amount of recovery in such case is not limited to the benefit conferred upon the defendant or to the price set forth in the contract, but the plaintiff may recover the fair and reasonable value

of his part performance. *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co., supra; Southern Painting Co.* v. *United States ex rel. Silver, supra; St. Paul-Mercury Indemnity Co.* v. *United States,* 238 F.2d 918 (C.A. 10, 1956); *Michael Del Balso* v. *Carozza, supra; United States* v. *Brotherton,* 106 F.Supp. 353 (S.D. N.Y., 1952); *Boomer* v. *Muir,* 24 Pac.2d 570 (Cal. App., 1933); *Valente* v. *Weinberg, supra; Heitz* v. *Sayers,* 32 Del. 207, 121 Atl. 225 (1923); *Connolly* v. *Sullivan,* 173 Mass. 1, 53 N.E. 143 (1899); *Hemminger* v. *Western Assurance Co.,* 95 Mich. 355, 54 N.W. 949 (1893); *Johnston* v. *Star Bucket Pump Co.,* 274 Mo. 414, 202 S.W. 1143 (1918); *Matter of Montgomery,* 272 N.Y. 323, 6 N.E.2d 40 (1936); *Philadelphia* v. *Tripple,* 230 Pa. 480, 79 Atl. 703 (1911); *Knapp* v. *Gaston Teyssier,* 96 Pa. Super. 193 (1929); *Pelletier* v. *Masse, supra.* Many other cases to the same effect are cited in Palmer, "The Contract Price as a Limit on Restitution for Defendant's Breach," 20 Ohio St. L. Jour. 264, at 270 (1959). The view expressed in these cases has gained the support of the leading American authorities on the subject. Williston, CONTRACTS, § 1485 (rev. ed. 1937); Corbin, CONTRACTS, §§ 1112 and 1113 (1951); Woodward, QUASI CONTRACTS, § 268 (1913).

2. Though the contract price has been said by some authorities to be evidence of the value of the plaintiff's part performance, it sets no limit upon plaintiff's right of recovery. Williston, CONTRACTS, § 1485 (rev. ed. 1937); Restatement, CONTRACTS, § 347, comment "c"; *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co., supra.*

It is only where a plaintiff himself is in default that the measure of recovery is limited to the benefit con-

ferred upon the defendant. *Schwasnick* v. *Blandin, supra;* Williston, CONTRACTS, § 1475 (rev. ed. 1937). *Cf. United States* v. *Mississippi Valley Generating Co., supra.*

Since restitutionary relief is not limited to the benefit received by the defendant where the plaintiff is not in default, there is no reason to equate the value of Acme's performance in this case to the value of the benefit received by the Government. Even so, the value of the benefit "received" by the Government in this case is not measured by the contract price but by the value of the "service or forbearance rendered at the defendant's request." Restatement, CONTRACTS, § 348, comment "a".

The cases supporting Acme's position are legion. For example, in *Mooney* v. *York Iron Co.,* 82 Mich. 263, 46 N.W. 376 (1890) the plaintiffs had contracted to sink a mining shaft but their work was stopped by the defendant before completion. Restitution measured by the reasonable value of the plaintiffs' work was granted. The court rejected the defendant's contention that the plaintiffs were entitled to recover only the value of the product of the work; instead, they were entitled to recover "what their work and labor is worth, whether it is of value to the defendant or not." In *Connolly* v. *Sullivan, supra,* the plaintiff was granted recovery of the value of his work in excavating a cellar for a house although the defendant had abandoned his plan to build the house. The court refused to allow deduction of a prospective loss on the contract—in fact, for part performance it allowed a recovery 60% higher than the contract price for full performance. In *Thompson & Son* v. *Brown,* 106 Iowa 367, 76 N.W. 819 (1898), plaintiff contracted to drill a water well but after he had drilled 130 feet the

drill broke in the well, making it necessary to start over again at a new location. The court found that the defendant had breached the contract by refusing to permit plaintiff to do this, and granted restitution measured by the reasonable value of the work. The value to the defendant, (using the test which the Government now urges the Court to adopt) was a useless hole in the ground 130 feet deep. Yet it seemed just to the Iowa Court to compel the breaching defendant to pay the reasonable value of the work he had asked plaintiff to perform.

The position here taken on the scope of restitution for defendant's breach is also fully supported by the writings on the subject. Williston, CONTRACTS, §§ 1459 and 1479 (rev. ed. 1937); Corbin, CONTRACTS, §§ 1107 and 1112 (1951); Dawson, "Restitution or Damages" 20 Ohio St. L. Jour. 175, 190 (1959); Palmer, "The Contract Price as a Limit on Restitution for Defendant's Breach," *supra.*

3. It is erroneous to characterize restitution as "punitive" for this distorts the entire concept of restitution. Restitution is not punitive but, on the contrary, its purpose is to restore the innocent party to as good a position as he would have been in had there been no contract. Under the Court of Claims' decision in the present case recovery is to be measured by actual losses to Acme, except to the extent that such losses are shown to be excessive. Acme in good faith incurred actual costs of over one million dollars in performing the contract [F. 60, R. 231]. It has received payments or other credits equal to approximately only one-half of that sum. Nevertheless, the Government says that even though the Government, not Acme, breached the contract, Acme can-

not recover such unreimbursed costs because this would amount to punishing the Government for its breach. The Government is thereby actually asking that it be allowed the full advantage of a contract which it breached by complete repudiation after part performance. To deny to the Government the advantage of such a contract under the circumstances of this case does not make the measure of recovery adopted by the Court of Claims punitive. The court below simply applied the rule recognized by this Court (*United States* v. *Behan, supra.*) that "it does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend." 110 U.S. at 84.

Respondent believes that the Government's motives in cancelling the contract have no bearing on the issue of the proper measure of recovery. Regardless of what those motives were, the simple fact is that the Government deliverately and consciously put an end to Acme's contract and the Government was fully aware that it was facing the risk of ultimately paying damages for breach of contract in an amount greater than what it would have cost the Government if the contract had been terminated for the convenience of the Government [F. 50(a), R. 204].

Acme's contract was not terminated for the convenience of the Government: the Government repudiated Acme's contract by cancelling it without justification. Thus, the fact that the contract contained a provision authorizing the Government to terminate the contract for the convenience of the Government is

of no importance under the facts of this case. The Government is not entitled to "breach its contract at will, and then escape the penalty for its breach by retroactively invoking a termination for convenience." *Klein* v. *United States,* 285 F.2d 778, 783 (Ct. Cl., 1961). The convenience termination clause should not, consequently, be held to limit the Government's liability to pay damages for breach of contract, where, as in this case, the cancellation is stated to be because of the fault or wrongdoing of the contractor, and it is thereafter determined the contractor was not at fault or engaged in wrongdoing. See *Klein* v. *United States, supra; Goldwasser* v. *United States,* 325 F.2d 722 (Ct. Cl., 1963).

C. The Measure of Recovery Adopted by the Court of Claims Does Not Impair Any Federal Policies.

The Government contends that even if restitution is allowable in a case like this as a matter of sound general contract principles, nevertheless, it should be disallowed on policy grounds.

Respondent is unable to ascertain from the Government's brief just exactly what federal policies it relies upon. There are general references to the Tucker Act, 28 U.S.C. 1491, to the regulations requiring supplies and services to be purchased on a fixed-price basis, to the policy of requiring contracts to be awarded on the basis of competitive bidding, and to the standard default and termination-for-convenience clauses. Respondent believes, however, that the Government has not shown the existence of any recognized and established policy which would limit the Government's liability when it breaches a contract in the manner in which the Government seeks to limit its

liability here. Such a policy, if one exists (and respondent contends it does not), must be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interest." *Muschany* v. *United States,* 324 U.S. at 66.

1. Prior to the enactment of the Tucker Act in 1887, the doctrine of sovereign immunity prevented the Government from being sued for breach of contract without its consent. The Tucker Act gave the Court of Claims power "to render judgment on any claim against the United States founded * * * upon any express or implied contract with the United States * * *." 28 U.S.C. 1491. This Court has said that since the Government has consented to be sued on implied and express contracts, the same remedies are available to the plaintiff suing the Government for breach of contract as would be available were the plaintiff suing another private individual. See, e.g., *Perry* v. *United States*, 294 U.S. 330 (1935).

That restitution is merely an alternative remedy for breach of contract is well-established (see pp. 23-28, *supra*). There is nothing in the Tucker Act which evidences a policy which would prohibit such a remedy under the circumstances of this case.

2. The Tucker Act authorizes suits against the United States "founded" upon express or implied contracts. This action is an action "founded" upon an express contract with the United States. In order for Acme to recover in this action, irrespective of whether it is seeking common law damages or restitutionary relief, it was first necessary for Acme to establish that the Government breached the contract. This was done. Without a breach of this express contract, Acme would

not be able to claim restitution, or, for that matter, damages for a breach. Thus, Acme's claim for restitution arose because of defendant's breach of an express contract. Acme's claim or cause of action is founded upon that contract—restitution is merely one form of relief that the law allows.

The Government's characterization of this action as being "quasi contractual" or "*quantum meruit*" is misleading. This is not a case where no express contract existed [see *Andrews* v. *O'Grady,* 252 N.Y.S.2d 814, 44 Misc.2d 28] or where an express contract had been declared void [See *New York Mail & Newspaper Transp. Co.* v. *United States, supra.*]. This is a case where an express contract was breached by the Government. Because of such breach, which in this case was a complete repudiation of the contract by the Government, Acme is entitled, as an alternative to seeking common law damages, to be placed in as good a position as it would have been had there been no contract. This remedy is not designed to punish the Government. It is designed merely to make Acme whole for the reasonable expenses actually incurred by it in good faith in performing the contract. Surely, the Government should not be allowed to say that it was relieved from complying with the terms of Acme's contract on the one hand and, at the same time, say that Acme was bound by the terms of such contract irrespective of the Government's repudiation of the contract.

3. Respondent submits that the policy of purchasing supplies and services on a fixed-price basis so far as possible does not impose limits on the amount of recovery when the Government breaches a contract. The weight of authority in this country is to the effect

that the contract price is no limitation on the amount recoverable where a plaintiff demands restitution but such contract price is merely evidence of the value of the plaintiff's performance. The Government's fixed-price policy should not be distorted so as to allow the Government to breach a contract and at the same time enforce its provisions against an innocent plaintiff. See *United States* v. *Behan, supra.* Where the Government's termination of a contract does not constitute a breach of contract, then there is, perhaps, some justification for limiting a contractor's recovery. But where the termination is wrongful and constitutes a breach of contract, there is no such justification.

4. Although respondent maintains that the Government has not shown the existence of any recognized policies which would deny restitutional relief in this case and respondent maintains that there are no such policies, respondent believes that the measure of relief adopted by the Court of Claims cannot and does not offend such policies, if there be any. It should be noted that Acme's recovery is limited to the reasonable value of its services [R. 109]. The Government has received a benefit at least to this extent for this was part of that which was bargained for. Acme's costs were incurred in actually performing the contract, not merely in preparation for performance. It cannot be said that punitive damages are being imposed on the Government for the remedy goes no further than repairing the injury suffered by Acme in partially performing a contract which it did not anticipate would be breached before it was completely performed. Acme's costs are merely *prima facie* evidence of the value of its performance. Costs which are shown by the Government as having been incurred, not because of

the Government's cancellation, but because of Acme's inefficiency or extravagance and illegal costs, such as kickback payments latently included in payments to subcontractors, are, according to the Court of Claims, to be deducted from Acme's recovery. Respondent believes that with these guidelines, such a rule is not only consistent with well-established legal precedent but cannot offend any clearly defined federal policy.

CONCLUSION

Respondent respectfully submits that the decision of the court below on the issues before this Court was correct and that such decision should therefore be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 86

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY

PETITION FOR REHEARING

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Court's opinion and upon which the decision of this Court rests, are contrary to the Findings of Fact of the Court of Claims.

I.

The Ground on Which the United States Cancelled the Prime Contract With Acme Was Not the Kickback Violations.

The Court of Claims found as a fact that there existed simultaneously two reasons of equal validity in the view of the Army to cancel Acme's contract, namely: (1) the termination of military requirements for the 75-mm rifle and (2) suspicion of Acme's fraud [F. 50, Tr. 204]. Although the alleged kickback violations were considered as a possible justification for the cancellation of Acme's contract by the Army, the Findings of Fact of the Court of Claims relating to post cancellation procedures make it clear that the kickbacks were not relied upon by the Army as a basis for cancellation because of the great doubt which then existed as to whether the Anti-Kickback Act applied to Acme's contract or as to whether there was any right to cancel for the alleged kickback violations [F. 54-55, Tr. 212-223]. It was not until the United States filed its answer in the Court of Claims seven years after it cancelled Acme's contract that violation of the Anti-Kickback Act was specifically advanced as a justification for the United States' cancellation.

II.

It Is Incorrect to Say That the Only Work Not Subcontracted Was the Final Finishing and Assembling of Components.

This Court, on page 3 of its opinion, has overlooked the fact that the most difficult part of the entire contract, that is, the fabrication of the rifle barrels, was performed by Acme in its own plant [Tr. 79, F. 37,

Tr. 158-160]. The extreme difficulties encountered by Acme in fabricating these barrels, which was the most critical part of the 75-mm rifle, are set forth in detail in the Findings of Fact of the Court of Claims [F. 34-44, Tr. 153-194].

III.

Joshua Epstein Was Never Told or Warned That Tucker, Jr. Was Suspected of Having Engaged in Contingent-Fee Arrangements.

The Court has apparently inadvertently confused Harry Tucker, Jr., with his father, Harry Tucker, Sr. It was not Tucker, Jr., who was suspected of having engaged in contingent-fee arrangements with other Government contractors but Tucker's father, who was never connected in any manner whatsoever with Acme. At no time was any official of Acme ever advised or warned that Tucker, Jr. (as opposed to his father, Tucker, Sr.) was suspected of having engaged in any contingent-fee arrangements [F. 8(d), Tr. 128; F. 30, Tr. 149]. There is no Finding of Fact by the Court of Claims that any official of Acme ever received any information to the effect that Tucker, Jr., was suspected of having engaged in any illegal activities.

IV.

There Is No Way in Which Any Kickbacks Could Be Passed on to the Government Under the Facts of This Case.

Acme's bid price of $337 per rifle was so far below the bid of the only established producer of the 75-mm rifle that it cannot be said that this bid price included or could have included any kickback element. At the time Acme submitted its bid, the only other producer of the 75-mm recoilless rifle was the Firestone Tire and Rubber Company which was then producing the recoilless rifle at a price to the Government of $452.60

per rifle. Firestone's bid on this particular contract was $428 per rifle [F. 7, Tr. 126-127]. The Army in fact actually considered Acme's bid price to be too low and offered Acme the opportunity to withdraw its bid [F. 7, 10, 13, Tr. 126, 130, 132]. Under these facts, it cannot be said that Acme's bid was or could have been inflated by any kickbacks.

The total kickbacks allegedly paid in connection with Acme's subcontracts total only approximately $15,000 [F. 54(b), (h), Tr. 213, 218]. The cost data submitted by Acme to be used as a basis for price redetermination reveal a cost of performance of $1,179.29 per rifle through December 31, 1953, and estimated cost to complete of $453.31 per rifle as compared to the contract ceiling price of $362.90 [F. 52, Tr. 206]. The Army would have to disallow approximately $600,000 of Acme's actual costs in order to fall below the ceiling price of $1,191,077 [Tr. 101]. Since Acme's actual costs, exclusive of the alleged kickbacks, overwhelmingly exceed the contract ceiling price, it cannot be said that there was a possibility of the kickbacks being passed on to the Government in the form of a price redetermination upward. Acme's price was not inflated but, on the contrary, the Army was indeed receiving a bargain for it was purchasing for a ceiling price of $362.90 a rifle which actually cost on the average more than $600 to produce.

V.

The Government Is Unjustly Enriched by the Court's Decision.

When the Government cancelled Acme's contract, it withheld from Acme payment for a number of rifles actually delivered to the Government prior to cancellation [F. 54, Tr. 212]. In addition, the Govern-

ment withheld from payments otherwise due to Acme approximately $54,000 as liquidated damages which the Court of Claims held the Government had no right to do [F. 46, Tr. 115-117, 199]. Hence, the Government has received approximately $75,000 to $100,000 worth of recoilless rifles for which it has paid nothing. Under these circumstances, even if the Government had the right to cancel Acme's contract because of the kickbacks, it should still be required to pay Acme the reasonable value of the rifles which were actually delivered to it and which it has not paid for after deducting any sums due the Government on its counterclaim.[1] See *Crocker* v. *United States,* 240 U.S. 74, 81-82 (1916).

CONCLUSION

It is respectfully urged that this Court reconsider its decision of December 5, 1966, in the light of the true facts as were found by the Court of Claims. Respondent submits that this Court has, by its decision, placed an unjust burden upon Government contractors. Even though the individuals involved in this case were convicted of no crime, Acme is being punished by contract cancellation for their acts. But, it is not necessary to punish an innocent party in order to enable the Government to rid itself of a contract of this nature for the Government could have terminated this contract for its own convenience.

Because the decision of this Court is based on facts contrary to those found by the Court of Claims and for the other reasons set forth herein, respondent, Acme Process Equipment Company, respectfully prays

[1] The Court of Claims found the Government was entitled to recover $17,890 on its counterclaim [Tr. 128].